

Branch International Services, Inc.; Ben Ruegsegger Trucking Service, Inc.; J & L Transport, Inc.; B.I.S., Inc. of Ohio and International Brotherhood of Teamsters, Local No. 486, AFL-CIO. Cases 7-CA-34973, 7-CA-35147, 7-CA-35147(2), and 7-CA-35780

November 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On May 9, 1995, Administrative Law Judge Steven M. Charno issued the attached decision. Respondent B.I.S., Inc. of Ohio filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings,² and conclusions except as modified and set forth in full below.³

¹ No exceptions were filed to the judge's findings that Respondents Ben Ruegsegger Trucking Service, Inc. (RTS) and J & L Transport, Inc. (J & L) violated Sec. 8(a)(5) and (1) by refusing to recognize and bargain with the Union, failing to honor the collective-bargaining agreement, and by unilaterally changing terms and conditions of employment; that RTS violated Sec. 8(a)(1) by telling employees that it would go out of business if the Union did not permit it to purchase less costly insurance; Sec. 8(a)(3) and (5) by terminating operations in retaliation for the Union's refusal to modify the contract; and Sec. 8(a)(5) and (1) by telling employees that they would have to apply to work for J & L to retain their seniority and by dealing directly with employees; and that J & L, RTS, and Respondent Branch International Services, Inc. (BIS) violated Sec. 8(a)(3) by constructively discharging employees. Respondent B.I.S., Inc. of Ohio (BISO) excepts to the judge's findings that it is also liable as a joint employer with J & L for the constructive discharges and that J & L violated Sec. 8(a)(5) by refusing to provide the Union with requested information.

Respondent BISO also excepts to the judge's failure to dismiss the complaint based on its contention that the Regional Director improperly postponed the hearing. The hearing was originally scheduled for February 1, 1994. On January 1, Respondent RTS requested the Regional Office to postpone the hearing. Charles Garavaglia, BISO's owner and president, admitted that the General Counsel notified him on January 27 that the hearing would be rescheduled. He stated that he nonetheless appeared pro se on February 1 and should have won "by default" because he did not receive written notice until the February 15 written Order rescheduling the hearing to June 7. When asked how BISO was prejudiced by the failure to receive timely notice in writing, Garavaglia referred to Sec. 106.16 of the Board's Rules and Regulations and cited the additional work required to defend against further allegations filed on April 4 and to respond to a related subpoena.

We agree with the judge that BISO has failed to demonstrate prejudice. Garavaglia had actual notice of the postponement and there is no evidence that BISO had insufficient time to prepare its defense before the rescheduled hearing. We note that the hearing was held on 9 days throughout June, July, and September and thus spanned several months during which BISO could prepare and refine its defense. Under these circumstances, we find that these exceptions lack merit.

² Respondent BISO has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1950). We have carefully examined the record and find no basis for reversing the findings.

ORDER

The National Labor Relations Board orders that

A. Respondent Ben Ruegsegger Trucking Service, Inc. and its alter ego, Respondent J & L Transport, Inc., Kawkawlin, Michigan, their officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local No. 486 of the International Brotherhood of Teamsters, AFL-CIO (the Union) as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit:

All company drivers and owner/operators (drivers) employed by Ben Ruegsegger Trucking Services, Inc. Branch International Services, Inc. J & L Transport, Inc., and B.I.S. Inc., of Ohio, at the 1754 Chip Road, Kawkawlin, Michigan facility, but excluding mechanics, guards and supervisors as defined in the Act.

(b) Bypassing the Union and dealing directly with employees in the appropriate unit by (i) insisting that its employees submit new applications to work for a nonunion company in order to retain their seniority and (ii) meeting with its employees and discussing terms and conditions of employment.

(c) Threatening to go out of business unless the Union agrees to modify the collective-bargaining agreement.

(d) Terminating its carrier operations in retaliation for the Union's refusal to modify the collective-bargaining agreement.

(e) Creating a purportedly nonunion entity to perform the operations formerly performed by RTS.

(f) Refusing, during the term of a collective-bargaining agreement, to supply the Union with requested information.

Additionally, BISO asserts that the judge's findings are the result of bias and prejudice. After a careful examination of the entire record, we are satisfied that this allegation is without merit.

We adopt the judge's finding, for the reasons set forth in his decision, that J & L Transport, Inc. is the alter ego of Respondent RTS and is therefore obligated to recognize and bargain with the Union, to apply the terms of the contract between the Union and RTS, and to remedy the unfair labor practices of its alter ego, RTS. The General Counsel has excepted to the judge's failure to address allegations that J & L is jointly and severally liable for remedying the unfair labor practices of RTS and Branch International Services, Inc. (BIS), under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); and *Golden State Bottling v. NLRB*, 414 U.S. 168 (1973). We find it unnecessary to pass on these exceptions, in light of our adoption of the judge's alter ego finding.

³ We disagree with the judge that Respondent BISO is liable for the constructive discharge of employee William Shook on September 3, 1992. Contrary to the judge's finding, the record shows that BISO had not entered into a contractual relationship with J & L as of that date. Accordingly, its status as a joint employer of the unit employees did not commence until September 6, 1992. We shall modify the judge's recommended Order and notices accordingly.

We shall also include in our Order and notices language in accord with our decision in *Indians Hills Care Center*, 321 NLRB 144 (1996), as modified by *Excel Container, Inc.*, 325 NLRB 17 (1997).

tion necessary to the Union's proper administration of the agreement.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively with the Union as the collective-bargaining representative of employees in the appropriate unit.

(b) On request, supply the information sought in the Union's letters to Respondent J & L Transport, Inc. dated October 12, November 3, and December 3, 1993.

(c) Within 14 days after service by the Region, post at their Kawkawlin, Michigan facility copies of the attached notice marked "Appendix A."⁴ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, any of the Respondents have gone out of business or closed any facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since June 21, 1992.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

B. Respondents Ben Ruegsegger Trucking Service, Inc. and J & L Transport, Inc., Kawkawlin, Michigan, and Respondent B.I.S., Inc. of Ohio, Valley View, Ohio, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit:

All company drivers and owner/operators (drivers) employed by Ben Ruegsegger Trucking Services, Inc. Branch International Services, Inc. J & L Transport, Inc., and B.I.S. Inc., of Ohio, at the 1754 Chip Road, Kawkawlin, Michigan facility, but excluding mechanics, guards and supervisors as defined in the Act.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Failing and refusing to honor and abide by their collective-bargaining agreement with the Union.

(c) Failing to satisfy their collective-bargaining obligations before modifying the terms and conditions of employment of the employees in the appropriate unit.

(d) In any like or related matter interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate policies of the Act.

(a) Recognize and, on request, bargain collectively with the Union as the collective-bargaining representative of employees in the appropriate unit.

(b) Reinstate, honor, and abide by the terms of their collective-bargaining agreement with the Union from the date of the Respondents' repudiation thereof on September 11, 1993, forward, and make whole the employees in the appropriate unit for any loss of wages or other benefits that they may have incurred by virtue of the Respondents' unlawful conduct, plus interest, in the manner set forth in the remedy section of the decision.

(c) Within 14 days after service by the Region, post at their Kawkawlin, Michigan, and Valley View, Ohio facilities copies of the attached notice marked "Appendix B."⁵ Copies of this notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, any of the Respondents have gone out of business or closed any facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since June 21, 1992.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

C. Respondents Ben Ruegsegger Trucking Service, Inc. and J & L Transport, Inc., Kawkawlin, Michigan, Respondent Branch International Services, Inc., Rochester Hills, Michigan, and Respondent B.I.S., Inc. of Ohio, Valley View, Ohio, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against their employees for engaging in concerted protected activities.

⁵ See fn. 4, *supra*.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate policies of the Act.

(a) Within 14 days from the date of this Order, offer Don Dillon immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Don Dillon whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days of the date of this Order, remove from their files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back-pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at their Kawkawlin, Michigan, Rochester Hills, Michigan, and Valley View, Ohio facilities copies of the attached notice marked "Appendix C."⁶ Copies of this notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, any of the Respondents have gone out of business or closed any facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since June 21, 1992.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

D. Respondent Branch International Services, Inc., Rochester Hills, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing, during the term of a collective-bargaining agreement, to supply the Union with re-

quested information necessary to the Union's proper administration of the agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate policies of the Act.

(a) Within 14 days after service by the Region, post at its Rochester Hills, Michigan, facility copies of the attached notice marked "Appendix D."⁷ Copies of this notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 21, 1992.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

E. Respondents, Ben Ruegsegger Trucking Service, Inc. and J & L Transport, Inc., Kawkawlin, Michigan, and Respondent Branch International Services, Inc., Rochester Hills, Michigan, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in concerted protected activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer William Shook immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make William Shook whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from their files any reference to the unlawful discharge,

⁶ See fn. 4, *supra*.

⁷ See fn. 4, *supra*.

and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personal records and reports, and all other records necessary to analyze the amount of back-pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at their Kawkawlin, Michigan and Rochester Hills, Michigan facilities copies of the attached notice marked "Appendix E."⁸ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, any of the Respondents have gone out of business or closed any facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since June 21, 1992.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

APPENDIX A

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with the International Brotherhood of Teamsters, Local No. 486, AFL-CIO as the exclusive collective-bargaining representative

of the employees in the following appropriate bargaining unit:

All company drivers and owner/operators (drivers) employed by Ben Ruegsegger Trucking Services, Inc. Branch International Services, Inc. J & L Transport, Inc., and B.I.S. Inc., of Ohio, at the 1754 Chip Road, Kawkawlin, Michigan facility, but excluding mechanics, guards and supervisors as defined in the Act.

WE WILL NOT bypass the Union and deal directly with the employees in the appropriate unit by (i) insisting that employees submit new applications to work for a nonunion company in order to retain their seniority and (ii) meet directly with unit employees and discuss terms and conditions of employment.

WE WILL NOT threaten to go out of business unless the Union agrees to modify the collective-bargaining agreement.

WE WILL NOT refuse to bargain with the Union by failing or refusing, during the term of a collective-bargaining agreement, to supply the Union with requested information necessary to the Union's proper administration of the agreement.

WE WILL NOT terminate carrier operations in retaliation for the Union's refusal to modify the collective-bargaining agreement.

WE WILL NOT create a purportedly nonunion entity to perform the operations formerly performed by RTS.

WE WILL NOT, in any like or related matter interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL recognize, and, on request, bargain collectively with the Union as the collective-bargaining representative of employees in the appropriate unit.

WE WILL furnish to the Union in a timely manner the information requested by the Union on October 12, November 3, and December 3, 1993.

BEN RUEGSEGGER TRUCKING SERVICE,
INC.

J & L TRANSPORT, INC.

APPENDIX B

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union

⁸ See fn. 4, supra.

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with the International Brotherhood of Teamsters, Local No. 486, AFL-CIO as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit:

All company drivers and owner/operators (drivers) employed by Ben Ruegsegger Trucking Services, Inc. Branch International Services, Inc. J & L Transport, Inc., and B.I.S. Inc., of Ohio, at the 1754 Chip Road, Kawkawlin, Michigan facility, but excluding mechanics, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to honor and abide by our collective-bargaining agreement with the Union.

WE WILL NOT fail to satisfy our collective-bargaining obligations before modifying the terms and conditions of employment of the employees in the appropriate unit.

WE WILL NOT, in any like or related matter interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL, recognize and, on request, bargain with the Union as the collective-bargaining representative of employees in the appropriate unit.

WE WILL reinstate, honor, and abide by the terms of our collective-bargaining agreement with the Union from the date of our repudiation thereof on September 11, 1993, forward, and WE WILL make whole the employees in the appropriate unit for any loss of wages or other benefits that they may have incurred, plus interest.

BEN RUEGSEGGER TRUCKING SERVICE,
INC.

J & L TRANSPORT, INC.

B.I.S., INC. OF OHIO

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees for engaging in concerted protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Don Dillon immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Don Dillon whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Don Dillon, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

BEN RUEGSEGGER TRUCKING SERVICE,
INC.

J & L TRANSPORT, INC.

BRANCH INTERNATIONAL SERVICES,
INC.

B.I.S., INC. OF OHIO

APPENDIX D

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse, during the term of a collective-bargaining agreement, to supply the Union with re-

requested information necessary to the Union's proper administration of the agreement.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

BRANCH INTERNATIONAL SERVICES,
INC.

APPENDIX E

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees for engaging in concerted protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer William Shook full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make William Shook whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful discharge of William Shook, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

BEN RUEGSEGGER TRUCKING SERVICE,
INC.

J & L TRANSPORT, INC.

BRANCH INTERNATIONAL SERVICES,
INC.

*Dennis R. Boren, Esq. and George M. Mesrey, Esq., for the
General Counsel.*

Richard C. Sheppard, Esq. and Patrick O. Duggan, Esq. (Smith & Brooker, P.C.), of Bay City, Michigan, for Respondent J & L Transport, Inc.

Charles Garavaglia, of Rochester Hills, Michigan, for Respondents Branch International Services, Inc. and B.I.S., Inc. of Ohio.

Gerry Miller, Esq. (Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman), of Milwaukee, Wisconsin, for the Charging Party.

DECISION

STEVEN M. CHARNO, Administrative Law Judge. In response to charges filed by Local No. 486 of the International Brotherhood of Teamsters, AFL-CIO (the Union), a consolidated complaint was issued on May 18, 1994, which alleged that Respondents Branch International Services, Inc. (BIS), Ben Ruegsegger Trucking Services, Inc. (RTS), J & L Transport, Inc. (J&L) and B.I.S., Inc. of Ohio (BISO) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Respondents' answers denied the commission of any unfair labor practice.

A hearing was held before me in Bay City, Michigan on June 7 and 8, in Detroit, Michigan on July 18 and 19 and in Bay City on July 20 and 21 and September 19-21, 1994.¹ Initial post-hearing briefs were submitted by General Counsel and Respondents J&L, BIS and BISO under extended due date of December 27, 1994, and reply briefs were filed by J&L, BIS, and BISO under extended due date of January 27, 1995.

FINDINGS OF FACT

I. JURISDICTION

RTS, a Michigan corporation, with an office and place of business in Kawkawlin, Michigan, was engaged in the interstate transportation of freight until September 10, 1993, and, thereafter, in the leasing of trucks and equipment to J&L. During the year ending September 10, 1993, RTS derived gross revenues in excess of \$50,000 from the interstate transportation of freight. It is admitted, and I find, that RTS is an employer engaged in commerce within the meaning of the Act.

BIS, an Indiana corporation, with an office and place of business in Rochester Hills, Michigan, was engaged in leasing employees to other businesses, including RTS, which were directly engaged in the interstate transportation of freight. During 1991, an admittedly representative period, BIS, in the conduct of its operations within Michigan, provided employee leasing services valued in excess of \$50,000 to customers outside the State. I find BIS to be an employer engaged in commerce within the meaning of the Act.

Since September 2, 1993, J&L, a Michigan corporation, with a place of business in Kawkawlin, Michigan, has been engaged in the interstate transportation of freight. It is admitted, and I find, that J&L is an employer engaged in commerce within the meaning of the Act.

Since January of 1993, BISO, an Ohio corporation, with an office and place of business in Valley View, Ohio, has been engaged in leasing employees and equipment to other businesses, including J&L, which are directly engaged in the interstate transportation of freight. During the period ending No-

¹ BISO's amended articles of incorporation were erroneously identified as ALJ Exh. 2. In order to eliminate duplicative exhibit numbers, that document is reidentified as ALJ Exh. 4.

vember 13, 1993, BISO, in the course of its business within Ohio, provided leasing services valued in excess of \$50,000 to customers outside the State. It is admitted, and I find that, BISO is an employer engaged in commerce within the meaning of the Act.

The Union is admitted by RTS, BIS and J&L to be, and I find is, a labor organization within the meaning of the Act.²

II. ALLEGED UNFAIR LABOR PRACTICES

A. Factual Background

Ben Ruegsegger was, at all times material, the President and sole owner of RTS. During the 2 years preceding the cessation of RTS's motor carrier operations, he withdrew from the day-to-day management of RTS and turned these duties over to his son, Alan Ruegsegger, and his daughter, Lynn McNally, both of whom were admitted supervisors of RTS. Alan, RTS's general manager, handled some personnel matters, dispatched traffic (i.e., assigned loads to drivers), dealt directly with customers and did occasional maintenance. Lynn handled billing and collections, payroll, procurement, personnel, and licensing issues and occasional dispatching. Decisions to make purchases of greater than nominal value were reserved to Ben Ruegsegger. Ron McNally, Lynn's husband, did some dispatching and was in charge of most of RTS's maintenance, while Jacqueline Ruegsegger, Alan's wife, worked in RTS's office in Lynn's absence for 1 week in 1991 and 1 day in 1993.

The Union has represented a unit of RTS's drivers and owner-operators since at least 1964.³ RTS's recognition of the Union has been embodied in a series of collective-bargaining agreements, the most recent of which was effective by its terms from April 1, 1991, through March 31, 1994. During the negotiations leading to that contract, the Union made certain financial concessions and obtained the right to periodically inspect RTS's books. Faced with high costs for workers' compensation and health insurance, Alan Ruegsegger contacted BIS and inquired about leasing employees. BIS was able to provide workers' compensation and health insurance coverage through a self-insured fund at lower rates than were otherwise available to RTS. On November 14, 1991, RTS and BIS entered a lease agreement which provided that RTS would lease its entire work force from BIS, thereby taking advantage of the lower insurance rates. On December 30, 1991, BIS adopted and became a full party to the collective-bargaining agreement between RTS and the Union.⁴ Although the Union never waived the unit's contractual right to receive Blue Cross/Blue Shield employee health insurance, RTS and BIS substituted the latter's health insurance plan on January 27, 1992.

² This finding is based, in part, on the credited testimony of James Ayes, the Union's business agent, concerning the Union's nature and function.

³ The following is an appropriate unit for the purpose of collective bargaining:

All company drivers and owner/operators (drivers) employed by Respondents at or out of Respondent Ruegsegger's 1754 Chip Road, Kawkawlin, Michigan facility, but excluding mechanics, guards and supervisors as defined in the Act.

⁴ The record establishes that RTS and BIS were joint employers of the unit employees within the meaning of the Act. RTS admitted joint employer status in its answer to the consolidated complaint, while BIS stipulated to the binding nature of the joint employer finding made in *Branch International Services*, 313 NLRB 1293, 1295 (1994).

On June 21, 1993,⁵ BIS sent RTS a letter stating that it was canceling the employee lease because "the present employees and Local 486 seem not to want the health insurance coverage we supply" On July 14, RTS sent the Union a letter requesting a meeting to discuss the pending cancellation of the employee leasing agreement. The requested meeting, which was held on July 25 at the union hall, was attended by Alan and Ben Ruegsegger on behalf of RTS, James Ayers, the Union's business agent, and 12 members of the unit. During the meeting, Alan stated that RTS was losing money and that it wanted the Union to reopen the contract in order to allow the employees to receive the BIS health insurance. Alan further indicated that, if the Union did not allow the carrier to use BIS's insurance, RTS would be forced to go out of business.⁶ The Union refused to permit any modification of the collective-bargaining agreement, and Ben left the meeting saying: "There's no sense talking to these people anymore. We'll just shut the doors."⁷ On July 26, RTS sent the Union written notification that it would go out of business on August 21 and offered to meet with the Union over "closure." On August 20, RTS sent a facsimile to BIS asking the latter to leave the employee lease in effect until September 11 in order to allow RTS's customers to find other carriers. The same day, BIS replied by letter that "Branch will extend their service to your Corporation to September 11, 1993." RTS ultimately laid off all of the unit employees on September 11.⁸ When the lease agreement terminated on September 11, the laid off employees were transferred from BIS to RTS.⁹

In early August, Alan and Jacqueline Ruegsegger met with Lynn and Ron McNally to discuss the formation of another interstate carrier. Thereafter, Alan and Lynn again met and discussed the matter.¹⁰ Alan then held discussions with RTS's largest customer, DowBrands, in an effort to secure the latter's patronage and, sometime prior to August 17, he prepared, signed and submitted a written bid for DowBrands' traffic.¹¹

⁵ All dates hereinafter are 1993, unless otherwise indicated.

⁶ Alan's statements are drawn from Ben Ruegsegger's credited testimony, which is supported by RTS's answer to the consolidated complaint.

⁷ The finding concerning Ben Ruegsegger's comments is based on the credited testimony of employee Donald Dillon.

⁸ The layoff notice is of record.

⁹ The collective-bargaining agreement provided that, if the lease were terminated, the employees leased to RTS would "on that date revert back to being employees of" RTS. BIS appears to contend that the reversion actually took place on September 10. On consideration of the language of the contract and correspondence at issue, I conclude that the parties to the lease intended for BIS to provide its services until 11:59 p.m. on September 11. This conclusion is supported by the fact that any other construction (1) presupposes that the parties intended for the employees to be wholly without health and workers' compensation insurance on September 11 and (2) is contravened by Ben Ruegsegger's testimony that he wished BIS's service to continue until that date.

¹⁰ Lynn McNally credibly testified as to both meetings. Based on the consistency of her testimony, her voluntary admission of facts detrimental to her interest on several occasions and her demeanor while testifying, I find the greater part of her testimony to be credible.

¹¹ These findings are based on two documents of record: (1) an undated bid signed by Alan, which was submitted, "as previously discussed," to DowBrands on behalf of "L & J, Inc.," a name later dropped in favor of J&L and (2) an August 17 bid with identical rate quotations signed by Alan's wife, which was submitted to DowBrands on behalf of J&L. Although Alan denied participation in the formation of J&L, as well as any association with L & J, he admitted authorship

On September 1, Lynn McNally opened a checking account for J&L with a \$2000 deposit. The address on that account was 2188 Wheeler Road, Bay City, Michigan,¹² which was both the McNally residence and J&L's office.¹³ On September 2, J&L held a corporate organizational meeting, during which Lynn McNally was named president and Jacqueline Ruegsegger was named secretary-treasurer, each was identified as the holder of fifty percent of J&L's stock and each committed herself to make a capital contribution of \$15,000.¹⁴ Lynn paid in an additional \$13,000 on September 3, while Alan and Jacqueline Ruegsegger jointly borrowed \$15,000 on September 21, which was paid into J&L's account the same day.¹⁵ Also on September 2, Lynn and Jacqueline filed J&L's "Articles of Incorporation" and an application supported by DowBrands for motor carrier operating authority, which authority was subsequently granted by the Interstate Commerce Commission.¹⁶

During this period, Alan and Lynn met with Ben Ruegsegger and discussed J&L's leasing of some of RTS's tractors and trailers.¹⁷ On September 6, two form leases were signed by Ben for RTS, Lynn for J&L and Alan as a witness.¹⁸ In lieu of executing a lease schedule setting forth the amount of rent to be paid, Ben and Lynn entered a parole agreement that J&L would initially pay RTS \$4000 per month, an amount sufficient to cover Ben's carrying costs on the equipment and one admittedly below fair market value for the rentals.¹⁹ At the same time, Lynn and Ben entered an oral lease whereunder J&L used RTS's garage in Kawkawlin at a monthly rental (paid for the

of the L & J bid when confronted with the document. Alan Ruegsegger was an evasive, inconsistent, often unresponsive witness who repeatedly indulged a penchant for mendacity while testifying. Accordingly, I reject his self-serving testimony concerning the contested issues in this proceeding and credit only his admissions against interest.

¹² The account statement is of record.

¹³ Sometime between September 1, 1993, and September 19, 1994, J&L moved its principal place of business to an office which it constructed in the Kawkawlin, Michigan building it leased from RTS.

¹⁴ The minutes are of record. On brief, the General Counsel characterizes this meeting as a "charade" because the decisions recorded in the minutes may have been made before the meeting. Given the pro forma nature of most such meetings, I reject the General Counsel's characterization.

¹⁵ The loan and deposit account documentation are of record.

¹⁶ Both application and authority are of record. On brief, Respondents contend that some significance should be attached to the fact that RTS provided service pursuant to a common carrier certificate, while J&L provided service for the first 6 months of its existence pursuant to a contract carrier permit. Since there is no probative evidence that J&L was unable to provide the same service as had been provided by RTS, I must reject Respondents' contention. If one only needs to drive the family sedan, the question of whether one's driver's permit allows one to operate an 18-wheeler is of limited relevance.

¹⁷ I credit Ben's admission to this effect over Alan's self-serving testimony that he played no part in the formation of J&L.

¹⁸ The General Counsel observes on brief that neither father nor daughter was represented at the signing by counsel and that Ben had not seen the leases prior to execution. Given Lynn's credited testimony that the form leases in question were those previously used by RTS to rent owner-operator equipment, I don't find the General Counsel's observations to be significant.

¹⁹ Lynn McNally credibly so testified without controversion. The General Counsel notes that she variously characterized the rental amount as \$1000 per week and \$4000 per month and suggests that this testimony demonstrates a lack of credibility. I demur and find that the alternative formulations are not materially at variance.

first time in January 1994) of \$500.²⁰ J&L was also allowed to park equipment on certain unimproved portions of the Kawkawlin property free of charge.²¹ Finally, J&L contemporaneously entered a written agreement to buy some of RTS's office equipment for \$1375, to be paid in monthly installments of \$55.²² It appears uncontested that Alan and Lynn did not have the financial resources to rent or purchase tractors and trailers from any source other than their father. Accordingly, J&L never explored the purchase of another motor carrier or the acquisition of operating and office equipment from any source other than RTS.²³ Similarly, Ben Ruegsegger never considered selling or disposing of RTS in any manner other than that set out above.²⁴

Also on September 6, J&L entered an agreement to lease its entire work force from BISO. Under that agreement, BISO provided payroll services and benefit plans, including the same workers' compensation and employee health insurance coverage which BIS had provided for RTS.²⁵ The agreement specifically provides that BISO shall "[h]ire, fire, discipline and regulate all working conditions and labor policies" for the employees leased to J&L.²⁶ Notwithstanding this recitation of BISO's authority, J&L maintains effective control over the leased employees in a number of respects. Specifically, J&L determines the size of its work force, selects the drivers it wishes to hire from those provided by BISO, sets the employees' work schedules and has the authority to terminate drivers.²⁷ Documentary materials prepared by J&L and distributed to the employees set forth "company requirements" that "[a]ll hiring will be done at our home office" and new employees who, "in the judgment of the company," do not meet job requirements during a 60-day probationary period "will be discharged."²⁸ These materials also provide for "disciplinary action" and set forth lists of "actions that may warrant disciplinary action or dismissal" and "actions that are cause for immediate dismissal." These materials bear J&L's name, but make no mention of BISO.

Prior to the time RTS ceased carrier operations, Alan Ruegsegger approached the RTS drivers and offered them positions at J&L.²⁹ On September 3 in the presence of Ben Ruegsegger and Lynn McNally, Alan gave William Shook an employment application for "our new company" and explained that Shook would be hired if he filled out the application.³⁰ Because Shook learned from Alan that the new company was a non-union shop, Shook declined to submit an application.³¹ Similarly, Alan told Don Dillon on September 9 that RTS was

²⁰ Lynn McNally credibly so testified without controversion.

²¹ I credit Lynn McNally's admission to this effect.

²² The purchase agreement is of record.

²³ I credit Lynn McNally's admission to this effect.

²⁴ I credit Ben Ruegsegger's admission to this effect.

²⁵ Both employee leases are of record.

²⁶ The employee leasing agreement between BIS and RTS contained an identical clause.

²⁷ Lynn McNally credibly so testified.

²⁸ The materials which contain these requirements are of record.

²⁹ Former RTS employees Mike Blood, Donald Dillon, and Bill Shook so testified. Dillon and Shook possessed relatively detailed recollections of their conversations and testified consistently on cross-examination, and Blood was still employed by Respondents when he testified. For these reasons and based on their demeanor on the stand, I credit their accounts of the job offers.

³⁰ While the application forms in issue were printed by and submitted to BISO, they carried J&L's name on the initial page.

³¹ Shook credibly so testified.

closing and that Dillon would have to submit a new job application in order to retain his job and seniority. Alan indicated that the job would be non-union, and Dillon refused to apply for a nonunion job.³² Shook and Dillon were not thereafter employed by J&L or BISO. J&L accepted two employment applications from RTS drivers before it entered the agreement to lease employees from BISO,³³ and Alan hired one driver on September 10 before that individual had filled out an application.³⁴ The drivers were not informed that Alan's position with J&L differed from the one he had held with RTS,³⁵ and, between September 13 and February 7, 1994, he dispatched J&L's drivers while unsuccessfully attempting to train his wife to do the job.³⁶ During a September 19 meeting of employees at J&L's offices, Lynn McNally discussed various terms and conditions of employment and announced that a 401(k) plan would thereafter be available, while Alan Ruegsegger responded to employee questions with an explanation of driver seniority and dispatch.³⁷ On or about September 19, BISO's 401(k) plan was made effective for J&L's employees³⁸ without notice to or bargaining with the Union.³⁹ No such plan had been available to the employees of RTS.⁴⁰ By December 23, nine of the 13 drivers leased by BISO to J&L were among those employed by RTS on September 10.⁴¹

The record demonstrates that RTS and J&L patronized the same suppliers. During J&L's initial operations, over 95 percent of its expenditures went to suppliers which had served RTS during the latter's final months of operation.⁴² More significantly, over 72 percent of J&L's expenditures for supplies were made through the same accounts previously used by RTS.

³² Dillon credibly so testified.

³³ The summary exhibit received in evidence without objection so indicates.

³⁴ Blood, while still in Respondents' employ, credibly so testified, and Respondents were unable to produce an application from Blood.

³⁵ Blood's wholly credible testimony that he was unaware of any change in Alan's position is supported by Lynn McNally's testimony and Alan's admission that they did not tell the employees that Alan was not J&L's dispatcher.

³⁶ It is uncontested that Alan was formally named J&L's dispatcher on February 7, 1994.

³⁷ Blood's credible testimony to this effect was confirmed in major part by Alan Ruegsegger.

³⁸ BISO so stipulated.

³⁹ The absence of notice to and bargaining with the Union appears to be undisputed.

⁴⁰ Blood credibly so testified without controversy.

⁴¹ This finding is based solely on the stipulation reached by BISO, J&L, and the General Counsel. At the hearing, counsel for the General Counsel stated that it would be possible to compare the lists of drivers for RTS and BISO to determine who had been employees of both. On inspection of the relevant exhibits, I am unable to ascertain whether RTS's employees Rodney Orchard, Vernon Cummings, Ronald Fox, and Randy Ryan are the same individuals as "K. Orchard," "D. Cummings," "G. Fox" and "R. Ryan" (who is further identified in J&L's leasing records as "Ray Ryan"), who subsequently worked for J&L. Accordingly, I reject as unsupported by the evidence the General Counsel's contention that 11 of J&L's 12 drivers on September 29 had been RTS drivers on September 10.

⁴² Statements relating to suppliers and customers refer to RTS's last three months of operation and J&L's first 3 months as an interstate motor carrier. The ratios appearing in text are derived from the parties' stipulations.

Billings received by J&L from three suppliers⁴³ were addressed to RTS or Ben Ruegsegger, two suppliers⁴⁴ mailed invoices to J&L at RTS's address and J&L's accounts with five suppliers⁴⁵ carried the same customer number as had RTS's accounts with those suppliers. During this period, Alan Ruegsegger made purchases on J&L's behalf.⁴⁶

J&L, which began operations on September 13, had gross revenues of \$320,826 during its first three months of operation in contrast with RTS's gross revenues of \$335,974 during the three months ending September 10.⁴⁷ The two carriers derived these revenues from the same customers. During J&L's first three months of operation, it carried freight for 14 of RTS's 17 largest customers; those 14 shippers were responsible for over 93 percent of the loads carried and revenues earned by RTS during its last 3 months. Over 74 percent of J&L's traffic by load and more than 77 percent of its revenues during its first three months of operation were attributable to customers who shipped on RTS during the latter's final days.⁴⁸ DowBrands, the largest customer of both carriers (accounting for more than 46 percent of the revenues of each), dealt with J&L through Alan Ruegsegger, informing him at the outset that DowBrands considered him to be J&L's "manager 'on (sic) record.'"⁴⁹

Union Business Agent Ayers, who was aware that RTS was scheduled to close on September 10, was informed by unit employees during early September that a new motor carrier called J&L was being formed and was distributing BISO employment applications to RTS drivers. On October 12, Ayers sent a certified letter to "J & L Leasing" at the Kawkawlin facility's address, which requested (1) any agreement with BISO or RTS, (2) a list of J&L's shareholders and their respective interests, (3) identification of J&L's officers and resident agent and (4)

⁴³ AGA Gas & Welding, Freightliner of Grand Rapids, and Safety-Kleen Corp., which was erroneously referenced in the parties' stipulation as "Safety-Kisen Corp."

⁴⁴ John H. Nickodemus & Sons, which was J&L's largest supplier, and AGA Gas & Welding.

⁴⁵ John H. Nickodemus & Sons, Euclid Automotive Supply, Bay Auto & Truck Parts, A-1 Truck Parts, and AGA Gas & Welding.

⁴⁶ The November 29 billing from Safety-Kleen Corp. bears his signature and initials.

⁴⁷ These figures do not support BISO's characterization of RTS as an "established company" and J&L as an "embryo company," and I reject the argument that J&L began its existence as a struggling, startup operation.

⁴⁸ The load and revenue ratios set out in text may understate the extent of the overlap between RTS's customers and those of J&L for two reasons. First, the traffic summary offered by the General Counsel makes no distinction between outbound and inbound loads. The former are actively solicited in quantity by carriers such as RTS and J&L. Obviously, the destination of outbound traffic determines the origin of a carrier's inbound or backhaul traffic. A significant amount of backhaul traffic consists of single loads, often carried for other motor carriers who do not wish to deliver a load in or around Bay City and find themselves without a backhaul. If the customers for which RTS and J&L carried only one or two loads were excluded from the traffic summary, the proportion of customers common to both carriers would be even larger. Second, the General Counsel failed to explore the relationship between J&L's traffic from Anheuser Busch and Miller Brewing, on the one hand, and both carriers' traffic from the distributors for Anheuser Busch and Miller Brewing, on the other hand. If the brewers and their distributors were related customers, the identity of customers between RTS and J&L would be virtually complete.

⁴⁹ This finding is based on a September 29 DowBrand's memorandum which was produced by the shipper pursuant to a subpoena requested by the General Counsel.

J&L's form of business organization and state of incorporation. The Postal Service attempted delivery of the letter, which prominently bore the Union's name, address and logo, on October 14. Delivery was refused, and the letter was returned to the Union on October 26. On November 3, the Union readdressed and sent the same letter by certified mail to "J & L Leasing" at 2188 Wheeler Road. The Postal Service left notices of attempted delivery, which typically contain the sender's name, at the Wheeler Road address on November 4 and 9. The letter was marked "unclaimed" and returned to the Union on November 19. Finally, the Union redated the same letter "December 3" and sent it by certified mail to "J & L Transport, Inc." at 2188 Wheeler Road. The Postal Service left notices on December 4 and 9 and returned the letter to the Union on December 19 marked "unclaimed."

Also on October 12, Ayers sent a letter to BIS at "2840 N. Perry, Box 214737" in Auburn Hills, Michigan. That letter requested (1) any agreements with RTS or "J and L Leasing," (2) a list of BIS's stockholders and their respective interests, (3) the sites of BIS's incorporation and of any "d/b/a" registration and (4) the identity of BIS's officers and resident agent. The envelope containing the letter to BIS indicates that delivery was "refused" on October 16 and 21, and the letter was returned to the Union on October 31.⁵⁰ By letter to the Union dated December 13, BIS denied receipt of the Union's October 12 letter, answered in major part the queries posed in the Union's letter and stated that it had not operated out of the Auburn Hills address or box since September 11 and that further correspondence should be addressed to "245 Avalanche Drive, Rochester Hills, MI." Changing the date on its October 12 letter to "December 16," the Union sent it by certified mail to BIS at the Rochester Hills address. The Postal Service left a notice of attempted delivery on December 20 and returned the letter to the Union at a date uncertain.

B. Discussion

1. Deferral

BIS, BISO, and J&L argue that the alter ego issue and certain related questions should have been deferred to arbitration pursuant to the Board's holding in *Collyer Insulated Wire*, 192 NLRB 837 (1971). The General Counsel did not address this

⁵⁰ BIS contends that it was no longer using Box 214737 in October. In support of this contention, BIS offered a reproduction of an unauthenticated document which purports to be a May 3, 1994 Postal Service memorandum signed by the Auburn Hills Branch Manager. While the designated subject of the memorandum is "P.O. Box 4737" (which is written in script approximately one-half the size of that in the body of the memorandum), the text of the document states "P.O. Box 214737 at Auburn Hills Mi. was rented to Branch International Services & C/G Construction from 6-19-90, to 12-24-92. This P.O. Box was closed on 12-24-92." BIS was aware of the conflict between the box number appearing in the "subject" and that in the body at the time the document was offered in evidence, but it took no action to clarify the matter. BIS's December 13 letter to the Union, which stated that BIS had not operated out of Box 214737 since September 11, 1993, casts further doubt on the idea that Box 214737 was closed during 1992. This doubt is not lessened by BIS's argument on reply brief that it paid for the box for a 6-month period, since such a payment would have resulted in the box being closed no later than June. Finally, BIS's December 13 letter was typed on stationery bearing the Auburn Hills address and "Box 214737." In sum, I find that the preponderance of probative evidence does not establish that anyone other than BIS refused the Union's letter on October 16 and 21.

argument during the course of the hearing or on brief. The Board had held that deferral is only appropriate where, inter alia, there is no claim of employer animosity to the employees' exercise of protected rights and the employer has asserted its willingness to utilize arbitration to resolve the dispute. *Textron Lycoming*, 310 NLRB 1209, 1210 (1993); *United Technologies Corp.*, 268 NLRB 557, 558 (1984). Because neither precondition exists here, I conclude that deferral is inappropriate in this case.

2. Alter ego status and alleged refusals to bargain

The General Counsel contends that J&L is a disguised continuance, or alter ego, of RTS and should therefore be required to recognize the Union and assume RTS's obligations under the collective bargaining agreement between RTS, BIS, and the Union. See *Advance Electric, Inc.*, 268 NLRB 1001, 1004 (1984). The Board has found an alter ego to exist where two enterprises have "substantially identical" business purpose, operations, equipment, customers, management, supervision and ownership. E.g., *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). Examination of the Companies' business purpose and operation in this case reveals entities engaged in exactly the same business in exactly the same market: both are interstate motor carriers of property originating traffic from north central Michigan. The terminal facilities and all of the equipment used by J&L as a fully operational carrier are those which were used by RTS in its final months of operation. The customer bases of the two carriers are substantially identical, in that J&L continued to serve virtually all of RTS's significant customers. The Board has long held that, for the purpose of determining alter ego status, "substantially identical" ownership exists where, as here, the stock of two corporations is owned by members of the same family. *Vinisa II, Ltd.*, 308 NLRB 135, 137 (1992); *Advance Electric, Inc.*, supra; *Shield-Pacific, Ltd.*, 245 NLRB 409, 415 (1979); *Crawford Door Sales Co.*, supra.⁵¹

Turning to the final question of whether the two companies share management and supervision, it appears undisputed that the day-to-day operations of RTS were managed and supervised by Lynn McNally and Alan Ruegsegger. McNally is an admitted manager and supervisor of J&L, where her duties closely parallel those she performed at RTS. The record demonstrates that Alan Ruegsegger is also a de facto manager and supervisor of J&L. During a period when Alan was not officially on J&L's payroll, he (1) solicited traffic from, formulated and submitted bids to and generally dealt with J&L's customers, the largest of which considered him to be J&L's manager; (2) hired, briefed and controlled the job assignments of employees, who had no reason to believe that his position with J&L differed from the one he had held with RTS; and (3) made purchases on J&L's behalf. In contrast, the record contains no probative evidence that Jacqueline Ruegsegger played a managerial or supervisory role at J&L. She had no identified part in J&L's acquisition of facilities, equipment or employees, and she was admittedly unable to assign work to its drivers. Her only demonstrated contact with a customer consisted of signing a bid prepared and previously tendered to that customer by her husband. The complete absence of evidence that Jacqueline

⁵¹ This case may be distinguished from the case cited on brief by J&L, *NLRB v. Bell Co.*, 561 F.2d 1264, 1268 (7th Cir. 1977), because RTS's owner continued to have a financial interest in and benefit from J&L's operations. See *Fugazy Continental Corp.*, 265 NLRB 1301, 1302 (1982).

ever functioned as an effective member of J&L's management or supervision⁵² is unsurprising given her lack of significant employment experience with RTS or any other carrier of comparable size. Accordingly, I find the management and supervision of the two companies to be "substantially identical."

In addition to the considerations set out above, it should be determined whether J&L was created in order to evade RTS's responsibilities under the Act, such as recognition of the Union or adherence to a collective-bargaining agreement. See *Fugazy Continental Corp.*, 265 NLRB 1301, 1302 (1982). This question is one of motive, and several arguments must be addressed to reach the answer. First, the General Counsel contends that the absence of fully formalized, arm's-length transactions between Ben Ruegsegger and his children demonstrates the existence of an unlawful conspiracy. I do not find a father's reliance on his children's word nor his willingness to extend preferential terms to them to be suggestive of an unlawful purpose. What I do find suggestive of unlawful motivation is Alan Ruegsegger's pervasive dishonesty in an attempt to hide his role in the formation and control of J&L. There is no apparent reason for him to go to such lengths if J&L is no more than a newly formed corporation whose owners received help from their father. In light of Alan's repeated perfidy in this proceeding, I find that the family motive for creating J&L was to purchase BISO's low-cost insurance in contravention of RTS's Union contract. This finding as to motivation is supported by the fact that the commencement of J&L's operations coincided precisely with the termination of RTS's. See *Continental Radiator Corp.*, 283 NLRB 234, 237 (1987).

For the foregoing reasons, I find that J&L was created as the alter ego of RTS in violation of Section 8(a)(3) and (5). I also conclude that RTS and J&L violated Section 8(a)(5) of the Act by (a) refusing to recognize the Union as the exclusive bargaining representative of the unit employees; (b) failing to honor the collective-bargaining agreement between RTS, BIS, and the Union; and (c) not satisfying their collective-bargaining obligations before modifying terms and conditions of employment.

3. Joint employer status and alleged refusals to bargain

Joint employers exist when two separate entities share or determine matters governing the essential terms and conditions of employment. *TLI, Inc.*, 271 NLRB 798 (1984). When entities are joint employers, each is jointly and severally liable for the other's refusal to bargain in good faith. *Branch International Services*, 313 NLRB 1293, 1301-1302 (1994).

It is established that RTS and BIS were joint employers at all times that their employee leasing agreement was in effect, but the alleged joint employer status of J&L and BISO is disputed. A joint employer finding is required in an employee leasing context where the employer to which the employees are leased meaningfully affects such matters relating to the employment relationship as hiring, firing, discipline, supervision, and direction. See *TLI, Inc.*, supra. Given the fact that J&L was shown to have hired and directed the work of BISO's employees and to have established its own disciplinary system, which made explicit provision for employee discharge, I find that BISO and J&L were joint employers at all times on and after the execution of their employee leasing agreement on September 6.

Based on the foregoing, I conclude that, on September 6, BISO became bound by the collective bargaining agreement

between J&L's alter ego and the Union. I therefore conclude that BISO violated Section 8(a)(5) of the Act as charged by (a) failing to recognize the Union; (b) failing and refusing to honor the collective-bargaining agreement; and (c) not giving notice to or bargaining with the Union before modifying terms and conditions of employment.

4. Alleged threat and retaliation by RTS

The General Counsel contends that RTS engaged in unlawful behavior when (1) Alan Ruegsegger stated on July 25 to RTS's employees that the carrier would go out of business if the Union did not allow RTS to use BIS's insurance and (2) RTS terminated motor carrier operations in retaliation for the Union's refusal to modify the collective-bargaining agreement so as to permit RTS to use BIS's insurance. RTS's unlawful creation of an alter ego in order to evade its collective-bargaining obligations demonstrates the existence of strong antiunion animus as well as RTS's intention to continue to operate a motor carrier unencumbered by collective-bargaining obligations. In light of RTS's creation of J&L, I conclude that (1) Alan's statement was outside the protection afforded by the ruling in *Textile Workers v. Darlington Co.*, 380 U.S. 263, 273-274 (1965), and was a threat violative of Section 8(a)(1) of the Act and (2) RTS's cessation of operations was retaliatory and, therefore, violative of Section 8(a)(3) and (5) of the Act.⁵³

5. Alleged direct dealing

The General Counsel charges that RTS bypassed the Union and dealt directly with its employees when Alan Ruegsegger told employee Dillon that the latter would have to submit a new employment application for J&L by the following day in order to retain his seniority as a driver. Having found above that the conduct in question did occur, I conclude that RTS violated Section 8(a)(5) as charged.⁵⁴

The General Counsel also charges that J&L bypassed the Union when the Company held a September 19 meeting with its employees in order to discuss terms and conditions of employment. Given J&L's obligation as RTS's alter ego to recognize the Union as the exclusive bargaining representative of its employees, I conclude that J&L's admitted activities on September 19 violated Section 8(a)(5) of the Act.⁵⁵

6. Alleged discharges

The General Counsel argues that RTS constructively discharged Dillon and Shook for refusing to execute new applications to work for J&L. I find that RTS's requirement that its employees submit new applications to work for an explicitly nonunion employer was a discriminatory condition precedent to continued employment by RTS's alter ego. Dillon and Shook did not submit applications because RTS's alter ego was nonunion, and I therefore find that they were denied continued employment because of their concerted protected activities. Accordingly, I conclude that RTS's constructive discharges of Dillon and Shook violated Section 8(a)(3) of the Act. *Craw-*

⁵³ The consolidated complaint, as amended at the hearing, did not allege that BIS shared liability for these violations, and the matter was not addressed by the General Counsel on brief.

⁵⁴ The consolidated complaint, as amended at the hearing, did not allege that BIS shared liability for this violation, and the matter was not addressed by the General Counsel on brief.

⁵⁵ The consolidated complaint, as amended at the hearing, did not allege that BISO shared liability for this violation, and the matter was not addressed by the General Counsel on brief.

⁵² Jacqueline Ruegsegger did not take the stand.

ford Door Sales Co., 226 NLRB at 1144-1145, 1150; *Blue Cab Co.*, 156 NLRB 489, 491 (1965). I further conclude that J&L remains liable for RTS's unfair labor practice.

In joint employer relationships where one employer supplies employees to another, both employers are liable for an unlawful termination if it may be inferred that (1) the nonacting joint employer knew or should have known that the other employer acted against the employees for unlawful reasons and (2) the non-acting employer acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it. *Capitol EMI Music, Inc.*, 311 NLRB 997, 1000 (1993). Resolution of this issue involves a shifting burden of proof. First, the General Counsel must make a prima facie showing that (1) the two employers are joint employers of a group of employees and (2) one of the joint employers has, with unlawful motivation, discharged an employee from the jointly managed work force. Because the General Counsel made the required showing in this proceeding,

[t]he burden then shifts to the employer who seeks to escape liability for its joint employer's unlawfully motivated action to show that it neither knew, nor should have known, of the reason for the other employer's action or that, if it knew, it took all measures within its power to resist the unlawful action. *Capitol EMI Music, Inc.*, supra.

Neither BIS nor BISO has met this shifted burden. Because BIS's joint employer relationship with RTS did not end until after the unlawful terminations and BISO's relationship with RTS's alter ego began prior to the discharges, I conclude that BIS and BISO are jointly and severally liable for the constructive discharges of Dillon and Shook.

7. Information Requests

The reports which the Union received from RTS's employees in early September, together with information supplied directly by RTS, provided a reasonable and objective basis for the Union to seek further information concerning the existence of an alter ego relationship among the joint employers. See *Mayben Energy Corp.*, 295 NLRB 149, 152 (1989). The Union's information requests to BIS and J&L were directed to that end.

J&L contends that it was not required to accept mail from the Union because (1) the first two pieces of mail were incorrectly addressed to "J and L Leasing" and (2) J&L had no relationship with the Union. Because J&L was RTS's alter ego, I find the first rationale to be a pretext and the second, to be false to fact. A respondent cannot avoid its collective-bargaining responsibilities merely because it rejects delivery of or refuses to claim its mail. *Swanson Group, Inc.*, 312 NLRB 184, 185 (1993). I therefore conclude that J&L's failures to respond to the Union's three requests for information were violative of Section 8(a)(5) of the Act.

BISO contends that it did not receive the Union's October 12 request until December. The Union's letter was repeatedly rejected by the holder of "Box 214737," and the probative evidence of record show that holder to have been BIS. As noted above, an employer cannot escape its collective-bargaining obligations by refusing to accept its mail. BIS ultimately answered the Union's October 12 request in a letter dated December 13 which, in the absence of any request by the Union

for amplification or supplementation,⁵⁶ I find to be an adequate response to the information sought by the Union. While adequate in content, BIS's response was clearly untimely. Accordingly, I conclude that BIS's 2-month delay in responding to the Union's information request was violative of Section 8(a)(5) of the Act. See *U. S. Postal Service*, 308 NLRB 547, 551 (1992); *Bundy Corp.*, 292 NLRB 671, 672 (1989). Because the Union had already received an adequate response from BIS when a second request for the same information was dispatched on December 16,⁵⁷ I find that BIS's failure to respond to the second request does not constitute an unfair labor practice.

CONCLUSIONS OF LAW

1. Respondents RTS and BIS are joint employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondents J&L and BISO are joint employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. Respondent J&L is, for the purpose of this proceeding, the alter ego of Respondent RTS.

5. All company drivers and owner/operators (drivers) employed by Respondents at the 1754 Chip Road, Kawkawlin, Michigan facility, but excluding mechanics, guards and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

6. At all times relevant herein, the Union has been the exclusive bargaining representative of the employees in the appropriate unit within the meaning of Section 9(a) of the Act.

7. By threatening to go out of business unless the Union agreed to modify the collective-bargaining agreement, Respondent RTS has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

8. By constructively discharging employees Don Dillon and William Shook, Respondents RTS, J&L, BIS, and BISO have engaged, and are engaging, in an unfair labor practice within the meaning of Section 8(a)(3) of the Act.

9. By the following acts, Respondent RTS has engaged in unfair labor practices in violation of Section 8(a)(3) and (5) of the Act: (a) terminating its carrier operations in retaliation for the Union's refusal to modify the collective-bargaining agreement and (b) creating a purportedly nonunion entity to perform the operations which RTS formerly performed.

10. By insisting that its employees submit new applications to work for a nonunion company in order to retain their seniority, Respondent RTS has engaged in an unfair labor practice within the meaning of Section 8(a)(5) of the Act.

11. By meeting with its employees and discussing terms and conditions of employment, Respondents RTS and J&L have engaged in an unfair labor practice within the meaning of Section 8(a)(5) of the Act.

12. By refusing on October 14, November 4, and December 4, 1993 to supply information requested by the Union and relevant to the Union's performance of its duties as the exclusive

⁵⁶ I do not consider the Union's dispatch of an identical information request after receiving BIS's answer to be a request for amplification or supplementation.

⁵⁷ I infer this from the fact that the Union's December 16 request was directed to the address specified in BIS's December 13 answer.

bargaining representative of the employees in the appropriate unit, Respondents RTS and J&L have engaged, and are engaging, in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

13. By refusing on October 16, 1993, to supply information requested by the Union and relevant to the Union's performance of its duties as the exclusive bargaining representative of the employees in the appropriate unit, Respondent BIS has engaged in an unfair labor practice within the meaning of Section 8(a)(5) of the Act.

14. By the following acts, Respondents RTS, J&L, and BISO have engaged, and are engaging, in unfair labor practices within the meaning of Section 8(a)(5) of the Act: (a) refusing to recognize the Union as the exclusive bargaining representative of the employees in the appropriate unit; (b) failing and refusing to honor the collective-bargaining agreement with respect to such employees; and (c) not satisfying their collective-bargaining obligations before modifying the terms and conditions of employment of the employees in the appropriate unit.

15. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

16. The preponderance of the evidence does not establish that Respondents have otherwise violated the Act as alleged in the complaint.

REMEDY

Having found that Respondents have violated Section 8(a)(1), (3), and (5) of the Act, I shall order that they desist

therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Respondents having discriminatorily discharged two employees, they shall be ordered to restore the status quo ante by offering Don Dillon and William Shook reinstatement and making them whole for any loss of earning and other benefits, computed on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondents RTS, J&L, and BISO will be ordered to (a) recognize and, on request, bargain with the Union; (b) honor and abide by their collective-bargaining agreement and (c) make whole any employees in the unit who sustained losses in wages or benefits because of Respondents' failure to honor their agreement with the Union, such amounts shall be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as computed in *New Horizons for the Retarded*, supra. Any employee benefit fund reimbursements shall be made in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). Respondents RTS and J&L shall also be ordered to provide the information sought in the Union's letters of October 12, November 3, and December 3, 1993.

[Recommended Order omitted from publication.]